FILE COPY

FILED

AUG 22 1972

MICHAEL RODAK, JR., CLERK

NO. 72-299

IN THE

Supreme Court of the United States

October Term, 1972

PILGRIM EQUIPMENT COMPANY OF HOUSTON,
Petitioner

v.

THE STATE OF TEXAS, ET AL,
Respondent

PETITION FOR WRIT OF CERTIORARI
To the Court of Civil Appeals, Houston,
1st Supreme Judicial District of Texas

LEWIS W. CUTRER
JAMES E. HAYS
Counsel for Petitioner
3901 Westheimer, Suite 301
Houston, Texas 77027

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002

Corrections -- third line page 14 should read: ...moved into new plant), totalled $26,455.00, as testified to by Guy Robertson, President of Pilgrim.

-- fourth line page 31 under Conclusion and Prayer should read: ...of said condemnation and are damages that the petitioner...

INDEX

	Page
Opinions Below	2
Statement of Jurisdiction	2
Questions Presented for Review	3
Applicable Law	4
Statement of Case	7
Argument and Authorities	18
Conclusion and Prayer	31
Appendix A:	
Order of Supreme Court of Texas Overruling Petitioner's Application for Writ of Error to the Court of Civil Appeals for the First Supreme Judicial District of Texas, April 26, 1972	A1
Order of Supreme Court of Texas Overruling Petitioner's Motion for Rehearing of Application for Writ of Error, May 24, 1972	A1
Opinion of Court of Civil Appeals, Houston, First Supreme Judicial District of Texas, November 4, 1971	A3

INDEX OF AUTHORITIES

CASES

	Page
Caleb J. Bowers v. Fulton County, Jan. 7, 1966, 146 S.E.2d 884, reh. den., Feb. 2, 1966. Supreme Court of Georgia..	26
City of Houston v. E. Huber, 311 S.W.2d 488, Civ. App. of Texas	28
City of Houston v. Lee M. Fox, 429 S.W.2d 201, Civ. App., Houston (1st District)	19
City of LaGrange v. Pieratt, et ux, 175 S.W.2d 243, Sup. Ct. of Texas	22
City of San Antonio, et al v. The Congregation of the Sisters of Charity of the Incarnate Word, Inc., 404 S.W.2d 333 (Tex. Civ. App., Eastland, 1966)	25
City of Teague v. Stiles, 263 S.W.2d 623, Civ. App., Waco	28
Fitzgerald v. City of Dallas, Civ. App., 34 S.W.2d 682, err. ref.	28
Harris County v. Gerhart, 283 S.W. 139, Supreme Court of Texas	23
Hart Bros. v. Dallas County, 279 S.W. 111, Com. of App. Tex. Sec. B, February 10, 1926	21

CASES

	Page
Magnolia Pipe Line Company v. City of Tyler, 348 S.W.2d 537 (Texarkana)	20
Northern Natural Gas Company v. Claude Johnson, et al, 278 S.W.2d 410, Civ. App. Amarillo, 1954 (reh. den. 1955)	21
State v. Waco Independent School District, 364 S.W.2d 263 (writ ref., n.r.e.)	25
State of Texas v. Honorable Ernest A. King, Judge of the County Court of Ward County, et al, 437 S.W.2d 420, Civ. App., El Paso, 1969	28
United States v. General Motors Corp., 65 S.Ct. 357, 323 U.S. 373	30

TABLE OF STATUTES

Constitution of the United States	
Amendment V	4
Amendment XIV	5
Constitution of the State of Texas	
Art. 1, Sec. 17	5
Vernon's Annotated Texas Statutes	
Art. 3265	5-7
Art. 6674n-4 (now 3266-b)	27
Texas Rules of Civil Procedure	
Rule 1	30
Rule 321	30

NO._____

IN THE

Supreme Court of the United States

October Term, 1972

PILGRIM EQUIPMENT COMPANY OF HOUSTON,
Petitioner

v.

THE STATE OF TEXAS, ET AL,
Respondent

PETITION FOR WRIT OF CERTIORARI
To the Court of Civil Appeals, Houston,
1st Supreme Judicial District of Texas

To The Honorable, The Chief Justice And Associate Justices Of The Supreme Court Of The United States:

Pilgrim Equipment Company of Houston, the Petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the Court of Civil Appeals, Houston, 1st Supreme Judicial District of Texas, entered in the above entitled case on November 4, 1971.

Opinions Below

The Opinion of the Court of Civil Appeals, Houston, 1st Supreme Judicial District of Texas, is unreported and is printed in Appendix "A" hereto, infra, page A3. The Orders made by the Supreme Court of Texas with respect to Petitioner's Application for Writ of Error to the Court of Civil Appeals and Motion for Rehearing are printed in Appendix "A" hereto, infra, page A1.

Statement of Jurisdiction

The Supreme Court of Texas refused Petitioner's Application for Writ of Error to the Court of Civil Appeals, Houston, 1st Supreme Judicial District of Texas, in the case of Pilgrim Equipment Company of Houston v. State, et al, Cause No. B-3135, as presenting no reversible error on April 26, 1972. A timely motion for rehearing in the aforesaid case was filed in the Supreme Court of Texas on May 11, 1972, and by Order of the Court was overruled on May 24, 1972.

The Supreme Court of the United States has appellate jurisdiction to review a final judgment or decree rendered by the highest Court of a state in which a decision could be had by virtue of 28 U.S.C.A. Section 1257(3), which provides, to wit:

> "By Writ of Certiorari, where the validity of a treaty or statute of the United States is drawn in question on the grounds of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commissions held or authority exercised under the United States."

Questions Presented for Review

QUESTION 1: Did the Court of Civil Appeals err in holding that "the question of adequate compensation was submitted to the jury" as required by 28 U.S.C.A. Const. Amend. V, and 28 U.S.C.A. Const. Amend. XIV, Section 1?

QUESTION 2: Did the Court of Civil Appeals err by not reversing and remanding the judgment of the trial court on account of the error committed by said court in refusing to allow the introduction of evidence by the defendant (Petitioner) as to moving costs, such costs being a necessary item of damage in a judgment rendering "just" or "adequate" compensation to a land owner as a result of a partial taking for public use through eminent domain, as required by 28 U.S.C.A. Const. Amend. V?

QUESTION 3: Did the Court of Civil Appeals err by not reversing and remanding the judgment of the trial court on account of the error committed by said court in refusing to allow the introduction of evidence by the defendant (Petitioner) as to cost of re-adapting the remainder after the taking, such cost being a necessary item of damage in a judgment rendering "just" or "adequate" compensation to a landowner as a result of a partial taking for public use through eminent domain, as required by 28 U.S.C.A. Const. Amend. V?

QUESTION 4: Did the Court of Civil Appeals err in holding "that the trial court did not err in refusing to allow recovery as separate items of damage, the loss of profit sustained by Petitioner's business and the moving costs and costs of re-adapting the remainder incurred by Pe-

titioner as a result of the condemnation of a portion of its property?

QUESTION 5: Did the Court of Civil Appeals err in holding that Points 4, 5 and 6 in Appellant's brief wherein Appellant contended that it should recover its moving costs and costs of re-adapting the remainder of its property for continued use thereof as a laundry and dry cleaning plant and also its loss of profits, all caused by a partial taking of its property by Appellees through condemnation, were points which were not specially presented to the trial court by the motion for new trial, and this court is not authorized to consider them?

Applicable Law

Petitioner would now show that the Federal questions upon which it bases its right to invoke the jurisdiction of this Court originates and is shown from a proper reading and interpretation of the following Constitutional provisions, amendments, and state statutes.

1: 28 U.S.C.A. Const. Amend. V, provides, to wit:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to bear witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation."

2: 28 U.S.C.A. Const. Amend. XIV, Section 1, provides, to wit:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizenship of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

3: Vernon's Ann. Tex. Const. Art. 1, Sec. 17, which provides:

> "No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person; and, when taken, except for the use of the state, such compensation shall be first made, or secured by a deposit of money; and no irrevocable or uncontrollable grant of special privileges or immunities, shall be made; but all privileges and franchises granted by the legislature, or created under its authority shall be subject to the control thereof."

4: Vernon's Ann. Civ. St. Art. 3265, which provides:

> "Section 1. The Commissioners shall hear evidence as to the value of the property sought to be condemned and as to the damages which will be sustained by the owner, if any, by reason of such condemnation and as to the benefits that will result to the remainder of such property belonging to such owner, if any, by reason of the condemnation of the property, and its employment for the purpose for which it is to be condemned, and according to this

rule shall assess the actual damages that will accrue to the owner by such condemnation.

Section 2. When the whole of a tract or parcel of a person's real estate is condemned, the damage to which he shall be entitled shall be the market value of the property in the market where it is located at the time of the hearing.

Section 3: When only a portion of a tract or parcel of a person's real estate is condemned, the Commissioners shall estimate the injuries sustained and the benefits received thereby by the owner; whether the remaining portion is increased or diminished in value by reason of such condemnation, and the extent of such increase or diminution and shall assess the damages accordingly.

Section 4. In estimating either the injuries or benefits, as provided in the preceding article, such injuries or benefits which the owner sustains or receives in common with the community generally and which are not peculiar to him and connected with his ownership, use and enjoyment, of the particular parcel of land, shall not be considered by the Commissioners in making their estimate.

Section 5. When the Commissioners have assessed the damages, they shall reduce their decision to writing, stating therein the amount of damages due the owner, if any be found to be due, and shall date and sign such decision and file it together with all other papers connected with the case promptly with the County Judge.

Section 6. Where a Plaintiff, after appeal from an award, or after said proceeding has become a case for trial and court, desires to dismiss, abandon the proceedings, or refuse the jury verdict returned by the jury or by a court prior to entry of judgment. said Plaintiff shall by motion be heard thereon. and

the court hearing the same may as part of the terms of granting such motion, make an allowance to the landowner for reimbursement of his reasonable attorney's and appraiser's fees, shown to have been incurred and, reimbursed for all necessary expenses incurred by the filing and hearing of such condemnation case to date of such hearing on said motion; provided, however, Plaintiff shall not be liable for any such fees or expenses in any case which may be dismissed upon its motion where such case is subsequently refiled, and where the Court is advised by a Plaintiff in connection with any such motion that it intends to refile such case, a reasonable time for such refiling shall be allowed, all orders entered hereunder are appealable.

Section 7. The owner of the land who is actually and physically displaced and permanently moves from his dwelling or place of business shall be entitled to, as a separate item of damages, the reasonable moving expenses for personal property other than machinery, equipment, or fixtures, not to exceed $500.00, when personal property is moved from a place of residence and not to exceed $5,000.00, when personal property is moved from a place of business, but the maximum distance of movement to be considered shall be fifty miles. In no event shall such expenses exceed the market value of such personal property; provided, however, that the provisions of this section shall not apply in any condemnation proceeding whether before special commissioners or the court where the owner is entitled to reimbursement for moving expenses under other existing laws."

Statement of Case

This is a case filed by the State of Texas in the County of Harris on February 25, 1969, in the County Civil

Court at Law No. 1 of Harris County, Texas, to condemn through the right of emient domain 4,918 square feet of Tract 1 referred to herein as condemnation Tract 311 together with the improvements thereon which consisted of approximately one-third of the first floor of the building on said Tract 1, leaving a remainder of 8,268 square feet of land and about two-thirds of the first floor of the building and the entire second floor of said building, and also condemned 3,229 square feet of Tract 2 together with the improvements thereon consisting of one-third of the corrugated iron building known as condemnation Tract 335, leaving as a remainder 6,258 square feet and two-thirds of said building. The actual date of taking by the Respondents as condemnors was June 10, 1969. This property was acquired for state highway purposes and became an integral part of the state highway system of the State of Texas, known as Southwest Freeway or U. S. Highway 59. The project was largely financed by Federal Highway Trust Funds.

The condemnation cut diagonally across both of the tracts of land owned by the Petitioners, slicing off the southerly portion thereof; that part of the property condemned, known as condemnation Tract 311, included the boiler room consisting of the boiler and water softener equipment which served and serviced the entire plant and the downstairs office and a large area in which was located and operated certain pressers, ironers, and other machinery and equipment. In fact, the northerly line of said condemned tract ran directly through and across different machinery and equipment including a huge six-roll ironer which weighed several tons and cut through ducts, steam lines, water lines, high-powered electrical conduits and included the air cooling machinery and

equipment located on the roof of that portion of the building actually condemned, and without which equipment the remainder of the plant could not operate. That on account of said condemnation, it was necessary for Pilgrim to sever the steam and hot water lines and air cooling conduits and high powered electrical lines and make several other costly repairs such as rebuilding a downstairs office and re-routing the plant conveyor system. It was also necessary for Pilgrim to relocate its machinery and equipment repair and parts department and motor repair maintenance and parts department and cabinet, fixtures and carpenter shop. On account of said condemnation, it was necessary for Pilgrim to go to considerable expense buying and installing a new boiler and water softener and readapting, reconstructing and re-equipping the remainder of its property in order to be able to continue the operation of its laundry business although on a much smaller scale and certain important and profitable services had to be discontinued.

The Judge of said court appointed three special commissioners and they had a hearing on March 27, 1969, and signed an award which was filed with the Judge of said court on April 24, 1969.

On May 9, 1969, the Defendant, Petitioner herein, Pilgrim Equipment Company of Houston, and Southland Life Insurance Company (lien holder) two of the defendants, filed objections and exceptions to the award of the commissioners.

On June 10, 1969, there was deposited into the registry of the Court the amount of the award of the special commissioners. Your Petitioner, in turn, withdrew the amount deposited by appropriate application and orders.

Plaintiff filed a Motion in Limine moving the Court to instruct the attorney for Defendant in advance of trial not to attempt to introduce evidence as to the cost of moving, relocation payments, and/or other expenses incidental thereto incurred or to be incurred by Defendants by reason of the condemnation of a portion of their property. Pursuant to this Motion in Limine, the trial court refused to admit any testimony or evidence relative to the readapting expenses incurred by your Petitioner in efforts to continue its business on the remainder of the tracts taken, and other moving expenses. Pilgrim Equipment Company of Houston continued to operate its dry cleaning and laundry business on the remainder for some four months after this taking, but soon found it economically infeasible to continue. Thus, it was necessary for Pilgrim Equipment Company of Houston to relocate its entire plant.

When your Petitioner started to introduce evidence as to the cost of moving machinery and equipment from the part taken to the remainder and from the remainder to the new plant, the attorney for the condemnors objected on the grounds that evidence relating to moving costs was inadmissible as it had nothing whatsoever to do with evaluation of real estate in this condemnation action as to the part taken and/or the remainder of the property, which objection was sustained by the Court (S.F. page 122). At this point, the Petitioner made a Bill of Exceptions in which Guy Robertson, President of Petitioner, testified as to various items of moving costs, both from the part taken to the remainder and, later, from the remainder to the new location, and also as to the over-all cost of purchasing and installing a new boiler and water softener and other machinery and equipment in the re-

mainder and other costs of reconstruction and repairs so as to readapt the remainder in order for it to continue to be used as a laundry and dry cleaning plant, although on a much smaller scale and with considerably less services (S.F. pp. 123-154). A renewed objection to the introduction of this evidence was sustained by the Court (S.F. p. 153).

In the Bill of Exceptions concerning moving costs and costs of readapting the remainder of Petitioner's property, Guy Robertson testified that the cost of moving machinery, equipment, etc., from the part taken to the remainder was $5,457.28 (S.F. p. 124). That the cost of constructing a new superintendent's office in the downstairs remainder to take the place of the superintendent's office which was taken in the condemnation was $3,565.41 (S.F. pp. 138-139). That the cost of loading and moving the maintenance department from the part of the property taken to the new plant on Stella Link was $550.00 (S.F. p. 126) and the cost of reinstalling of machinery in the new plant was $1,250.00 (S.F. pp. 126-127). That the cost of moving the maintenance shop and parts department from the part taken to the Stella Link location was $3,750.00 (S.F. pp. 127, 129). He testified that Pilgrim purchased a new boiler and a new two-roll ironer for flat work but did not state the price (S.F. p. 140). He also testified that the cost of moving office furniture, adding machines, etc. from the remainder on Almeda to the new location on Stella Link was $2,947.73 (S.F. p. 141), all of which aggregated something over $17,000.00.

The trial court's refusal to admit this evidence offered by Petitioner on moving expenses and costs of readapting the remainder was specifically presented to it in our

Amended Motion for New Trial, Assignments of Error Nos. 2, 3, 5 and 13.[1] Such amended Motion for New Trial was denied and overruled by the Court.

In the Court of Civil Appeals, Houston, 1st Supreme Judicial District of Texas, such assignments of Error 2, 3, 5 and 13, as contained in our Amended Motion for New Trial, were further tendered to that Appellate

---

1. *Second*—The Court erred in its ruling on the Motion in Limine filed by Plaintiffs herein, particularly by limiting and qualifying the evidence that the Defendants could introduce concerning moving cost and cost of readapting the remainder of their property for use as a laundry and cleaning establishment and loss of profits in the operation of their business as a result of and on account of the condemnation of a part of their property which is described in Plaintiffs' pleadings filed herein.

Third—The Court erred in refusing to admit and/or qualifying and commending upon the evidence introduced or to be introduced by the Defendants at the trial of this cause regarding moving cost, loss of profits, cost of adapting remainder of their property for use previously made thereof and other expenses suffered and sustained by the Defendants on account of the condemnation of their property hereunder, same being in violation of Amendment V of the Constitution of the United States and Article 1, Section 17 of the Constitution of the State of Texas, since such items represented actual damages sustained by the Defendants on account of the condemnation of their property and represented just compensation to which they were legally entitled.

Fifth—The Court erred in refusing to submit to the Jury the Special Issues which were duly and timely presented to the Court by the Defendants concerning moving cost suffered by the Defendants and also the cost of adapting the remainder of Defendants' property so that they could continue to operate a laundry and cleaning establishment thereon and also the loss of profits sustained by said Defendants on account of such partial taking, which under the preponderance, if not all of the evidence introduced, showed that due to such partial taking the Defendants had to relocate their business at substantial cost, expense and damages.

Thirteenth—The Court erred in signing and entering the Judgment for Plaintiffs herein, same being in violation of Amendment V of the Constitution of the United States and of Article 1, Section 17 of the Constitution of the State of Texas.

Court through Point of Error I, IV, and VI, as set out in the Brief of Appellant filed therein and made a part of this Petition for Writ of Certiorari. All points were overruled by said Court as evidenced by the Opinion of the Court of Civil Appeals, Houston, 1st Supreme Judicial District of Texas, which is set out in Appendix "A".

Further, your Petitioner would submit to this Court that the Federal question of "just compensation" for private property taken for public use was presented to the Supreme Court of Texas for due consideration in Points of Error 1-11, as set out in our Application for Writ of Error filed in the Supreme Court of Texas. Such Points of Error were assigned to show error by the Court of Civil Appeals in not reversing the trial court's judgment because of its failure to allow the introduction of any evidence on the cost of moving from the part taken to the remainder and to the new plant, and the cost of re-adapting the remainder. Our Application for Writ of Error addressed to the Supreme Court of Texas was refused, no reversible error, on April 26, 1972. A timely Motion for Rehearing was filed in the Supreme Court of Texas on May 11, 1972, and overruled by the Court on May 24, 1972.

The loss of profits to Pilgrim Equipment Company of Houston caused by the temporary interruption and disruption of its business on account of a partial taking of its laundry and dry cleaning plant through condemnation, (which was during the time that Pilgrim moved from the part taken to the remainder, and rebuilt, re-equipped and readapted the remainder so as to be able to continue their operation of the laundry and dry cleaning plant although on a smaller scale, which plan proved to be finan-

cially unsound and infeasible after several months operations and while Pilgrim thereafter planned, built, and moved into a new plant), totalling $26,455.00 as testified to by Guy Robertson, President of Pilgrim.

He testified that in June of 1969, which was the month of the partial taking of its property, the losses in its operations amounted to $1,396.26; and in July, $3,464.36; in August a loss of $1,981.15; in September a loss of $2,147.08; in October a loss of $2,069.97; and in December a loss of $1,095.82; and in January of 1970, a loss of $1,590.26; and in February a loss of $1,852.85; and in March a loss of $1,272.35; and in April a loss of $1,294.28; and in May a loss of $5,741.50, at which time, Pilgrim shut the operations down at the Almeda Plant (S.F. pp. 116 to 117). The Court qualified the introduction of such evidence as to loss of profits by instructing the jury not to consider such loss of profits, if any, except as to show how it affected the market value of the remainder of the property, if it did, after the taking (S.F. pp. 107, 116). The trial court qualified the introduction of our evidence as to loss of profits occasioned by this partial taking in response to an objection made by the attorney for the Plaintiff as to its admissibility.

Pilgrim Equipment Company of Houston urged this error to the trial court in its Amended Motion for New Trial, assignments of error numbers 2, 3, 5, 12 and 13. Such Motion for New Trial was denied and overruled.

Further, Petitioner presented this ground of error to the Court of Civil Appeals through Appellant's Points of Error Nos. 1 and 5, as set out in Pilgrim's brief filed with such Court, and made a part of this Petition for Writ of

Certiorari. These points were overruled by the Court of Civil Appeals as they affirmed the judgment below.

Such assignments of error 2, 3, 5, 12, and 13, as contained in our Amended Motion for New Trial were further raised for the consideration of the Texas Supreme Court in Petitioner's Application for Writ of Error (P. 6-10a) filed with that Court and made a part of this Petition for Writ of Certiorari. The Points of Error 5, 11, and 12, as contained therein, raised for the Court's consideration are germane to Assignments of Error 2, 3, 5, 12 and 13, mentioned above. Pilgrim's Application for Writ of Error was refused, no reversible error, on April 26, 1972, by the Supreme Court of Texas. A timely Motion for Rehearing in the Supreme Court of Texas was overruled on May 24, 1972.

The case was tried on its merits to a jury starting September 29, 1970. The charge of the Court, which included six special issues, was submitted to the jury on October 3, 1970.

The following special issues were timely requested by Pilgrim in the Trial Court and refused, to wit:

SPECIAL ISSUE NO. 1: From a preponderance of the evidence, what do you find was the amount of the loss of profits, if any, sustained by Pilgrim Equipment Company of Houston on account of the condemnation by the State of Texas and County of Harris of Pilgrim's property known as Tract Numbers 311 and 335?

Answer in dollars and cents.

Answer: _____

SPECIAL ISSUE NO. 2: From a preponderance of the evidence, what do you find was the cost to Pilgrim Equipment Company of Houston, if any, in moving its machinery, equipment and other personal property from Tracts 311 and 335, to the remainder of its property, cause, if you find it was so caused by the State of Texas and County of Harris in the condemnation of said property?

Answer by stating the amount in dollars and cents.

Answer: _____

SPECIAL ISSUE NO. 3: From a preponderance of the evidence, what do you find was the amount of the costs, if any, to Pilgrim Equipment Company of Houston in moving its machinery, equipment and other personal property from the part condemned in the remainder to its location on Stella Link Road, caused by the State of Texas and County of Harris, by the condemning of Tracts 311 and 335? Answer by stating the amount, if any, in dollars and cents.

Answer: _____

SPECIAL ISSUE NO 4: From a preponderance of the evidence, what do you find was the cost to Pilgrim Equipment Company of Houston, if any, in adapting the remainder of its property to use in the continued operation of its laundry and dry cleaning business caused by the condemnation of Tracts 311 and 335 by the State of Texas and County of Harris? Answer by stating the amount, if any, in dollars and cents.

Answer: _____

The timely requesting of such special issues shows that the Federal questions involved in this case were timely raised by the Petiitoner, Pilgrim Equipment Company of Houston, in the Trial Court.

At the beginning of the trial, it was stipulated and agreed by the parties, through their attorneys, that the date of actual taking of the property under condemnation was June 10, 1969, and that the only issues remaining to be adjudicated between the parties were: (1) the market value as of the date of taking of the land and improvements thereon owned by said Defendant and being condemned by Plaintiffs; and, (2) the other damages, if any, payable to the Defendant, Pilgrim Equipment Company of Houston, on account of the condemnation herein (Tr. p. 67).

Under the jury verdict, judgment was entered in favor of the Defendants for the sum of $61,846.00 for the land and improvements which were actually condemned and for the sum of $37,320.00 for the damages to the remainder of the Defendant's land and improvements, making a total of $99,166.00 and the judgment awarded the land and improvements under condemnation to the Plaintiff, the State of Texas, and the judgment provided that the Plaintiffs, the State of Texas and County of Harris, recover from the Defendants, Pilgrim Equipment Company of Houston and Southland Life Insurance Company, the sum of $45,834.00, plus interest thereon at the rate of six per cent per annum from date of judgment until paid, such sum being the amount by which the award of the special commissioners exceeded the verdict of the jury and said judgment taxed the cost of the proceedings before the special commissioners and of the Court against

the Defendant, Pilgrim Equipment Company of Houston, since the amount offered by the Plaintiffs to said Defendant of $118,366.00 prior to the institution of suit in eminent domain was in excess of the verdict of the jury (Tr. pp. 73-74), said judgment being signed and entered on December 1, 1970.

Argument and Authority

Pilgrim Equipment Company of Houston, herein called Petitioner, now prays that this Honorable Court take heed of our right set up under the Constitution of the United States and grant this Writ of Certiorari for the following grounds and reasons:

The right your Petitioner is seeking to protect is granted in 28 U.S.C.A. Const. Amend. V, wherein it is provided, "No person shall be deprived of life, liberty or property without due process of law; or shall private property be taken for public use, without just compensation." It is our contention that the term "just compensation" and "adequate compensation" include all damages sustained by the landowner. Therefore, at the very outset, let us say that the damages as sustained by the Petitioner on account of this partial condemnation include (1) the reasonable market value of the land taken, (2) damages to the remainder, namely, the difference between the reasonable market value of the remainder immediately before and immediately after the taking, (3) loss of profits sustained by the Petitioner caused by the interruption of its business and other causes on account of the taking, (4) the cost of readapting the remainder of the property for continued use thereof as a laundry and dry cleaning business, and (5) moving and relocating expenses from

the part taken to the remainder and later from the remainder to a new location made necessary by the condemnation. It is our position that Petitioner is legally and lawfully entitled to recover in this cause its loss of profits, moving costs, and costs of readapting the remainder of its property as separate items of damage and/or consequential damages suffered by said Petitioner on account of said partial taking of its property through condemnation. However, in the alternative, the evidence introduced by Petitioner in its Bill of Exception (S.F. 123-154) concerning moving costs and cost of readapting the remainder of its property should have at least been admitted by the trial court for consideration by the jury in determining the market value of the remainder of Petitioner's property immediately after the taking. However, we would submit to this Court that any such limitation or qualification made by a Trial Court so as to implement this alternative would not afford the Petitioner *just* and *adequate* compensation as guaranteed to it under and by virtue of the aforementioned articles of the Federal and State Constitutions.

The ultimate question for consideration by this Court is the meaning and scope of the phrase "just compensation" as it is contained in our Federal Constitution. We believe that the authorities in the State of Texas uniformly hold that in condemnation cases the landowner is to be made whole. In other words, he is to be placed in just as good a position after the condemnation as he was before.

Under the case of *City of Houston v. Lee M. Fox*, 429 S.W.2d 201, Civ. App., Houston (1st District), the Court stated the following well established principle of law:

> "The amount of damages allowed in a proceeding for the condemnation of a part of a tract of land for street or road purposes covers all lawful elements of damages, whether direct or consequential, that could reasonably have been foreseen and determined at the time of condemnation."

Certainly lawful elements of damages, both direct and/or consequential, that could reasonably have been foreseen and determined at the time of this condemnation in the instant case were moving costs, and cost of readapting the remainder of Pilgrim's property, as well as loss of profits sustained by Petitioner.

Magnolia Pipe Line Company v. City of Tyler, 348 S.W.2d 537, (Civ. App., Texarkana), among other things, says:

> "Every loss or diminution of what is one's own, occasioned by fault of another, whether it results directly to things owned or merely interferes with owner's right to legal and proper use thereof, constitutes 'damages' within Constitutional provisions prohibiting the taking or damaging of property for public use without adequate compensation." Vernon's Ann. St. Const. Art. 1, Section 17.

Certainly, cutting through and chopping off one-third of the first floor of the main laundry and dry cleaning plant of Pilgrim in the instant case and the adjoining one-story corrugated iron building used in connection therewith was a direct loss and diminution to Pilgrim and, furthermore, a very serious and costly interference with the right which it had to use and operate its property as a laundry and dry cleaning plant necessary to serve the 160 retail stores and pick-up stations which it owned and operated in and around the City of Houston.

In *Northern Natural Gas Company, Appellant, v. Claude Johnson, et al, Appellees*, 278 S.W.2d 410, Civ. App., Amarillo, 1954 (reh. den. 1955), the general principle is, of course, well established that just compensation in condemnation must be measured by the owner's loss and not by the taker's gain.

Hart Bros. v. Dallas County, 279 S.W. 111, Commission of Appeals, deals with the partial taking of the landowner's property through condemnation upon which, at the time of taking, there was being operated an established business. The condemnee made a case of a temporary interference for a definite time with such business whereby they sustained a loss of profits and were compelled to make necessary improvements, in amounts easily ascertainable. They continued to use their business as adapted to the change in conditions (all of which fits like a glove the facts in the instant case). The Court in that case held:

> "Under those circumstances, there is no doubt but that they are entitled to recover damages in such sum as will compensate them for the loss of the profits they would have derived and the expenditures they were required to make, during the temporary interruption of their business. Otherwise, they would not get full compensation for their loss.
>
> "It is in no sense a double recovery to allow damages for injury to one's land or interest therein, and at the same time to allow damages for injury to his mercantile or other business directed thereon. It takes both to compensate for the full loss where the land and the business as well have been damaged."

The evidence in the instant case clearly shows that on account of the partial taking of Petitioner's plant, it was necessary for it to spend several thousands of dollars mov-

ing and rearranging equipment and acquiring other machinery and equipment and making certain costly repairs to the remainder of its property in order to continue providing laundry and dry cleaning service. Such loss of profits and moving costs and costs of readapting the remainder were definitely testified to by the President of the Petitioner and should be included in a landowner's recovery of "just compensation" for private lands taken for public use.

The cornerstone case in this State concerning recovery of loss of profits to a landowner's business caused by temporary obstruction of a highway (which we think likewise applies to the facts in the instant case, there being a partial taking of the Petitioner's property and loss of profits to its business) is the case of *City of LaGrange v. Pieratt, et ux*, 175 S.W.2d 243, Supreme Court of Texas, the opinion of which was written by the very eminent and learned Justice Critz.

This was a suit by Pieratt and wife against City of LaGrange to recover loss of profits in Plaintiff's business caused by temporary obstruction of a highway. The Plaintiff was the owner and operator of a gasoline filling station. The Plaintiff's loss was occasioned by the temporary obstruction of the highway for several months while it was being widened, paved and otherwise reconstructed and improved by the State Highway Department acting under authority of a contract with the City. Under such contract, the State Highway Department did the work and paid the cost of improvements. It is interesting to note that the special commissioners awarded the Plaintiff damages in the amount of $100.00 for moving house, $100.00 for moving tanks, $20.00 for rebuilding toilet, $50.00 for

lights, $150.00 for placing gravel and $100.00 for land and damages. The Supreme Court of Texas noted:

> "As we interpret the above report (meaning report of special commissioners), it shows, as a matter of law, that the commissioners considered and awarded compensation for all elements of damage, direct and consequential, which the law contemplates in such a proceeding."

Justice Critz in his opinion said:

> "[1] Our laws regarding eminent domain make provision for two distinct condemnation situations: (a) the taking of the whole of a tract of land, and (b) the taking of only a part. In this case we are dealing with the taking of a part of a tract.
>
> [2] Damages in condemnation proceedings are limited to damages to property. Property must either be taken or damaged. Harris County v. Gerhart, 115 Tex. 449, 283 S.W. 139; 16 Tex. Jur., page 976, Section 300.
>
> [3, 4] For it to be considered that damages are to property, it is not necessary that such damages are to be measured by the extent of the injury to the physical property itself. A right of recovery is established by proof of injury to some right of property, and the damages are measured by the extent of the injury to that right. Thus, a business is property, and the reasonable damages for interference with the access to business property may be measured * * * by the loss of profits." 16 Tex. Jur. pp. 976-978, and authorities there cited; Hart Bros. v. Dallas County, Tex. Com. App., 279 S.W. 111.

Also relevant to this inquiry as to whether or not "just compensation" is afforded the landowner, absent a re-

covery of consequential damages sustained by him as a result of a partial taking, would be a careful reading of Vernon's Ann. Civ. St. Art. 3265, which is set out in full at Pages 5-7 of this Petition.

It should be noted that under Section 2 thereof, which deals with the partial taking of a tract, "the commissioners shall estimate the injuries sustained and the benefits received thereby *by the owner;* whether the remaining portion is increased or diminished in value by reason of such condemnation, and the extent of such increase or diminution and shall assess the damages accordingly." (Emphasis ours) In this situation, that of a partial taking, the above mentioned statute speaks of "injuries or benefits" received by the *owner* and not diminution in the *market value* of the land condemned. In the face of this Article and 28 U.S.C.A. Const. Amend. V, we would urge this Court to recognize that the Court of Civil Appeals, Houston, 1st Supreme Judicial District of Texas, erred by refusing to reverse and remand the judgment of the trial court on account of the error committed by said Court in refusing to allow the introduction of evidence timely presented by your Petitioner, as to moving costs and cost of readapting the remainder of the property so as to render it useful to Petitioner. We contend that such expenses constitute damages which have accrued to the landowner (Petitioner) as a result of this partial taking. Further, we would contend that the question of "adequate" or "just" compensation was not properly submitted to the jury because of the qualification placed upon the introduction of evidence relating to the loss of profits sustained by your Petitioner. Such qualification being to the effect that such evidence would be limited in its probative force, *i.e.*, only as to its bearing, if any, on the market value of the re-

mainder immediately after the taking. We would urge to this Court that this qualification and limitation on the probative force of this evidence (loss of profits) has operated to deny your Petitioner a right set up under the Federal Constitution.

City of San Antonio, et al, v. the Congregation of the Sisters of Charity of the Incarnate Word, Inc., 404 S.W. 2d 333 (Tex. Civ. App., Eastland, 1966). In this case the Court cited, *State v. Waco Independent School District*, 364 S.W.2d 263 (writ ref., n.r.e.) with approval:

> "[8] In the Waco Independent School District case, there were special damages for which the market value rule would not provide adequate damages. Under State and Federal Constitutions, a landowner whose land or a portion thereof is taken is entitled to adequate compensation. The Waco Court of Civil Appeals observed and complied with such Constitutional requirements. This Court also obviously and necessarily construed the provisions of Article 3265 in such a way that it would not be in conflict with the Constitutional requirement in special damage cases. * * *
>
> [9, 10] We do not believe that it was a holding in the Waco case, even by implication, that the owner of the private school whose land is condemned is, under the provisions of Article 3265, limited to a recovery under the market value test if the evidence shows that such test will not adequately compensate the owner for special damages suffered. In our opinion, a private school such as Appellee, the same as a public school, is not by reason of Article 3265 denied the right to adequate compensation. * * *

We believe that the proper scope of this Constitutional right was determined by the Supreme Court of Georgia

in *Caleb J. Bowers v. Fulton County*, Jan. 7, 1966, 146 S.E.2d 884, reh. den., Feb. 2, 1966. Herein the Court decided that the provision in the Georgia Constitution providing for just and adequate compensation for private property taken through eminent domain means that the condemnee is entitled to be compensated for *all* damages done to his property and expenses caused by the condemnation proceeding as separate and distinct items from the amount which he is entitled to recover as actual value of his building.

It is also interesting to note that the Texas legislature has enacted at least two articles which recognize moving expense as a proper item of recovery in an eminent domain case.

Section 7 of Article 3265, RULE OF DAMAGES, was added by Acts 1969, 61st Leg. p. 2293, Ch. 772, Section 1, eff. September 1, 1969, is one such enactment, set out verbatim on page 7 of this Petition for Writ of Certiorari. In our opinion, Section 7 of Article 3265, V.A.T.S., does not apply in this case for the reason that the section specifically states that it shall not apply in any condemnation proceeding whether before special commissioners or the court where the owner is entitled to reimbursement for moving expenses under other existing law. It is our contention that the Petitioner is entitled to reimbursement for moving expenses under both State and Federal Constitutions and the case law of this State. If, however, it should be concluded that such moving expenses were only recoverable but by virtue of this Section, how do we reconcile the trial court's refusal to admit evidence as to moving costs and the holding by the Court of Civil Appeals that your Petitioner failed to request an issue necessary for

recovery under Section 7. As a result of the trial court's exclusion of this evidence, there was no issue of fact relative to moving expenses before the jury for their determination. Such being true, your Petitioner was deprived of "just compensation" for its lands taken for public use and "due process of law" under our Federal Constitution.

Petitioner would also point to Article 6674n-4 of V.A.C.S., (now Article 3266-b) regarding moving expenses and state that same is not mandatory, but to the contrary, is merely permissive and left entirely to the discretion and will of the State Highway Commission as limited by the Federal Highway Relocation Assistance Program. Any decision made under this statute can be arbitrary and the landowner cannot do anything about it. In short, such statute does not afford Petitioner due process of law or any procedure by which it can legally recover any moving costs or expenses whatsoever. Such statute should not and cannot be construed to deprive your Petitioner of its legal rights under the Federal and State Constitutional provisions to have and recover just and adequate compensation. It is significant to point out that neither of the Articles of the statutes mentioned provide for any reimbursement or compensation for the costs of repairing, rebuilding, or readapting the remainder of the property where there has been a partial taking.

Petitioner now contends that moving costs, costs of readapting the remainder for future use in the same manner as before the taking, and loss of profits sustained by condemnee as a result of a partial taking are recoverable as a separate item of damage. These are items of expense which were incurred by the Petitioner as a result of the taking. The essence of the whole cause in the trial court

was the amount of damages sustained by the landowner. The Court of Civil Appeals held that the above items were not specially plead, so as to show that the damage sought was within the jurisdiction of the County Court at Law in which the case was tried. We urge that such standard does not apply to pleadings in a condemnation case. *City of Houston v. E. Huber,* 311 S.W.2d 488, Court of Civil Appeals of Texas:

> "It is not necessary for a property owner, objecting to an award of the Commissioners in condemnation proceedings, to particularize as to his damages. See Fitzgerald v. City of Dallas, Texas Civ. App., 34 S.W.2d 682, err. ref. It was not necessary, therefore, for the objections filed by any of the landowners to specify the damages sustained by such owner, or by Appellee, E. Huber."

State of Texas v. Honorable Ernest A. King, Judge of the County Court of Ward County, et al., 437 S.W.2d 420, Court of Civil Appeals of Texas:

> * * * "These cases and others have held, in the State of Texas, that strict or formal pleading requirements do not apply to objections which appeal condemnation commission proceedings. The sufficiency of objections, therefore, is not measured by the same standards applicable to pleadings in other causes of action. City of Teague v. Stiles, 263 S.W. 2d 623 (W. ref. n.r.e.). * * *"

These last two cases discussed hold that it is not necessary for a property owner to particularize his damages in condemnation proceedings and, furthermore, that the sufficiency of objections to the award of the special commissioners is not measured by the same standards appli-

cable to pleadings in other causes of action. Further, Petitioner would point out to this Honorable Court that no objection was ever raised against the introduction of our evidence on moving costs and costs of readapting the remainder by Plaintiffs on the grounds of "no pleadings". Our offer of such evidence was excluded and a Bill of Exceptions was promptly made. The evidence offered by your Petitioner as to loss of profits was qualified and limited by the Court. Petitioner would argue that its grounds for appeal have been adequately preserved in the trial court and specifically brought to attention. Petitioner would submit that the following actions: (1) offering such evidence, (2) making a Bill of Exceptions, and (3) requesting special issues on the same, were surely enough to place the trial court on notice as to our contentions and exceptions with respect to the exclusion of such evidence. Further, the Court of Civil Appeals has held that our points of error IV, V and VI, as contained in Appellant's brief, were not specifically presented to the trial court by a Motion for New Trial and thus could not be considered upon appeal. We would urge that such points were presented to the trial court in our Amended Motion for New Trial through Assignments of Error 2, 3, 5 and 13, as contained in the Amended Motion for New Trial. We believe that Points of Error I, IV, V and VI fairly and reasonably point out that the judgment rendered by the trial court was inadequate because "just compensation" was denied through the trial court's refusal to admit testimony offered during the trial on moving costs and costs of readapting the remainder, as well as their qualifying the evidence admitted on loss of profits. This ground of appeal was presented to the trial court in our amended Motion for New Trial and to the

Court of Civil Appeals in Appellant's brief. This interpretation of our Points of Error is required after a proper reading of Rule 1 of Texas Rules of Civil Procedure entitled "Objective of Rules" which provides, to wit:

> "The proper objective of Rules of Civil Procedure is to obtain a just, fair, equitable and impartial adjudication of the rights of litigants under established principles of substantive law. To the end that this objective may be attained with as great expedition and dispatch and at least expense both to the litigants and to the State as may be practicable, *these rules shall be given a liberal construction.*" (Emphasis ours.)

Rule 321, Texas Rules of Civil Procedure, says, "Each ground of a motion for new trial * * * shall briefly refer to that part of the ruling of the Court, charge given or refused, admission or rejection of evidence or other proceeding complained of in such way that the point of objection can be clearly identified and understood by the court." Certainly in our case the points of objection raised by the Defendant, Pilgrim Equipment Company of Houston, were clearly identified by the Assignments of Error heretofore referred to and there can certainly be no question but that they were understood by the court.

In closing it should be pointed out that the term "property"[2] as contained in the Federal Constitution has been employed to denote the group of rights inhering in a citizen's relation to the physical thing, as the right to *possess, use* and *dispose* of it. (emphasis ours). Its meaning has been expanded beyond its untechnical sense of

---

2. United States v. General Motors Corp., 65 S.Ct. 357, 323 U.S. 373.

the physical thing to which the citizen exercises rights recognized by law. Your Petitioner has been dispossessed of these "rights" which are inherent in its relation to the physical thing taken, i.e., the land. The loss of these "rights" has left Pilgrim Equipment Company of Houston with a deficit that is not remote or speculative, is not divorced from the land taken, and which can be adequately measured in dollars and cents. The taking of this fee simple interest in lands owned by your Petitioner has left it without such interest and all natural advantages which would flow from such ownership. Our only recourse is to look to the Supreme Law of our land for just compensation.

Conclusion and Prayer

The damages sustained by Petitioner in the way of moving costs and costs of readapting the remainder and loss of profits were foreseeable before and at the time of said condemnation and/or damages that the Petitioner is legally entitled to recover under and by virtue of the provisions of the State and Federal Constitutions and statutes of the State of Texas concerning condemnation and eminent domain and the court decisions. When private lands are taken for public use, the landowner must be made whole. The burden of public improvements must be placed on the shoulders of the general public and taxpayers.

We would suggest to the Court that this case, as presented in this Petition for Writ of Certiorari, is a prime example of a situation wherein the inadequacies of the "market value test" for compensating landowners in condemnation proceedings are exposed. The Constitu-

tional dictates of "just compensation" for private lands taken for public use necessarily implies some flexibility in application. We believe that a partial taking of land upon which is maintained and operated a successful business is such a situation which calls out for a more liberal, flexible and just application of this Constitutional right.

The trial court committed error by refusing to allow the Petitioner to introduce evidence as to moving costs and to the cost of reconstruction and readapting the remainder of Petitioner's property necessary for the continuation of the operation of its laundry and dry cleaning plant and the Court of Civil Appeals erred by not reversing and remanding the judgment of the trial court on account of said error.

The trial court erred by qualifying and limiting the evidence introduced by the Petitioner as to loss of profits since such loss occurred during the temporary interruption of Petitioner's business on account of the partial taking of its property by condemnation and the Court of Civil Appeals erred by not reversing and remanding the judgment of the trial court on account of such error.

The Court of Civil Appeals erred in holding that the question of adequate compensation was submitted to the jury since there was not included in the question of adequate compensation moving costs or costs of readapting the remainder of Petitioner's property and could not have been so submitted as the trial court refused to allow such evidence to go before the jury.

The Court of Civil Appeals erred in holding that the loss of profits cannot be recovered as an item for damage separate from that resulting from the depreciation in value of the remainder.

Wherefore, Petitioner respectfully prays that this Petition For Writ of Certiorari to the Court of Civil Appeals, Houston, 1st Supreme Judicial District of Texas be granted, and upon such hearing, that the Court grant Petitioner's Writ and the relief sought therein.

Respectfully submitted,

LEWIS W. CUTRER
JAMES E. HAYS
Counsel for Petitioner
3901 Westheimer, Suite 301
Houston, Texas 77027

APPENDIX A

In The Supreme Court of Texas

April 26, 1972

No. B-3135

Pilgrim Equipment Company of Houston

vs.

The State of Texas

From Harris County
First District

Application of petitioner for writ of error to the Court of Civil Appeals for the First Supreme Judicial District having been duly considered, and the Court having determined that the application presents no error requiring reversal of the judgment of the Court of Civil Appeals, it is ordered that said application be, and hereby is, refused.

It is further ordered that applicant, Pilgrim Equipment Company of Houston, and surety, American Employers' Insurance Company, pay all costs incurred on this application.

No. B-3135

May 24, 1972

Pilgrim Equipment Company of Houston	)	
	)	From Harris County
vs.	)	First District
	)	
The State of Texas	)	

Petitioner's motion for rehearing of application for writ of error having been duly considered, it is ordered that said motion be, and hereby is, overruled.

I, GARSON R. JACKSON, Clerk of the Supreme Court of Texas, do hereby certify that the above and foregoing is a true and correct copy the orders of the Supreme Court of Texas in the case numbered and styled as above, as the same appears of record in the minutes of said Court under the dates shown.

WITNESS my hand and the seal of the Supreme Court of Texas, at the City of Austin, this, the 3rd day of August, 1972.

GARSON R. JACKSON, Clerk

By: /s/ Eugene Cervenka, Deputy
Eugene Cervenka

Affirmed, and Opinion filed November 4, 1971.
TFC/b

NO. 15,811

PILGRIM EQUIPMENT COMPANY
OF HOUSTON, *Appellant*,
vs.
THE STATE OF TEXAS ET AL, *Appellees*.

Appeal from County Civil Court at Law
Of Harris County

This is a condemnation case. Judgment was entered based on a jury verdict. The land owner has appealed,

Six special issues were submitted to the jury. The land was taken from two separate tracts under single ownership. The issues related to the market value of the land taken and the damage to each of the tracts resulting from the taking.

Appellant's first three points complain that the judgment did not allow appellant just or adequate compensation; that the answer made by the jury to Special Issue No. 2 was conflicting and inconsistent with its answer to Special Issue No. 1; and that the answer to Special Issue No. 2 "was not supported by a preponderance of the evidence", and therefore that the court erred in entering judgment thereon.

The second and third points are based on the seventh assignment of error in appellant's motion for new trial reading: "The Court erred in not setting aside the answers of the jury to the Special Issues since such answers were inconsistent, incompatible and in sharp conflict with one another and contrary to the preponderance of the evidence introduced."

Rule 374, T.R.C.P., provides that a ground of error not distinctly set forth in the motion for new trial shall be considered as waived.

The assignment of error is directed to the entire verdict. It does not point out the particular answers that are alleged to be in conflict or inconsistent. The alleged error brought to the attention of the trial court by the assignment was the failure to set aside the verdict, which would have required a new trial. The attention of the court was not specifically directed to the point now raised, i.e., that the answers to Special Issues 1 and 2 are conflicting and inconsistent. No conflict or inconsistency is apparent from reading the issues and the answers made thereto. Appellant's Point 2 is without merit, and cannot be considered. Garvel v. Young, 407 S.W.2d 518 (Tex. Civ. App.—Houston 1966, writ ref., n.r.e.).

Since appellant, in the Amended Motion for New Trial, failed to state that the evidence supporting the jury answer to any specific special issue was either insufficient or against the great weight of the credible evidence, this court has no jurisdiction to consider Point 3. Darryl v. Ford Motor Co., 440 S.W.2d 630 (Tex. 1969).

By Point No. 1 appellant contends that the judgment based on the jury verdict did not allow appellant just

and adequate compensation required by the Constitutions of the United States and the State of Texas. The Constitution of the United States, Amendment V, requires payment of "just" compensation for property taken for public use. The Constitution of the State of Texas, Art. 1, Sec. 17, requires "adequate" compensation for property "taken, damaged or destroyed for or applied to public use."

The trial court has entered judgment for appellant in the amount found by the jury in answer to issues submitted in the language suggested by State v. Carpenter, 89 S.W.2d 194 (Tex. 1936). The question of "adequate compensation" was submitted to the jury. Brunson v. State, 444 S.W.2d 598 (Tex. 1969).

Since the answers made to these issues are supported by credible evidence, this court cannot substitute its opinion of the value of the property for that of the jury. By this point appellant does not present the question that the answers are contrary to the great weight and preponderance of the evidence. Point No. 1 is too general to constitute a basis for the reversal of the judgment. If the judgment is in fact inadequate, that result must have followed from the error of the trial court refusing to admit competent testimony offered at the trial; from the error of the trial court in manner of submitting the case to the jury; from the failure of the jury to answer the issues submitted in accordance with the weight and preponderance of the evidence; or from some such specific matter. It is appellant's burden to determine the specific matter which he contends constituted error and probably resulted in the rendition of an improper judgment. This matter must then be presented in accordance with the

procedural rules established by law or adopted by the Supreme Court to govern the trial and appeal of civil cases in this State. Art. 3266, V.A.C.S.; Hale v. Lavaca County Flood Control Dist., 344 S.W.2d 245 (Tex. Civ. App.—Houston 1961); Ingram v. Nueces County, 365 S.W.2d 838 (Tex. Civ. App.—San Antonio 1963).

Appellant contends that the trial court erred in rendering the judgment herein because appellant was entitled to recover (1) damages for the loss of profits suffered by reason of the partial taking; (2) the cost of readapting the remainder of its property for continued use as a laundry and dry cleaning plant; and (3) the moving costs caused by the partial taking.

These points of error are stated to be based Assignments of Error Nos. 2, 3, 5, and 13.[1] The points are too

1. "Second—The Court erred in its ruling on the Motion in Limine filed by Plaintiffs herein particularly by limiting and qualifying the evidence that the Defendants could introduce concerning moving cost and cost of readapting the remainder of their property for use as a laudry and cleaning establishment and loss of profits in the operation of their business as a result of and on account of the condemnation of a part of their property which is described in Plaintiffs' pleadings filed herein.

"Third—The Court erred in refusing to admit and/or qualifying and commenting upon the evidence introduced or to be introduced by the Defendants at the trial of this cause regarding moving cost, loss of profits, cost of adapting remainder of their property for use previously made thereof and other expenses suffered and sustained by the Defendants on account of the condemnation of their property hereunder, same being in violation of Amendment V. of the Constitution of the United States and Article 1, Section 17 of the Constitution of the State of Texas, since such items represented actual damages sustained by the Defendants on account of the condemnation of their prop-

general to comply with the briefing rules. Rule 418, T.R.C.P. Neither of the points complains that the court erred in admitting evidence offered by appellant with improper qualifications, nor do they complain that the trial court erred in refusing to submit properly requested issues. The points are germane to the assignments of error only in the sense that the matters complained of in the assignments of error made it impossible for appellant to secure jury findings on which to base a judgment for the specific additional damages he contends he was entitled to receive under the Constitutions of the United States and the State of Texas. These points were not specifically presented to the trial court by the motion for new trial, and this court is not authorized to consider them. Wagner v. Foster, 341 S.W.2d 887 (Tex. 1960); Wood v. State, 434 S.W.2d 149 (Tex. Civ. App.—Corpus Christi 1968); Daniels v. Daniels, 414 S.W.2d 207 (Tex. Civ. App.—Amarillo 1967); Baker v. Sturgeon, 361 S.W.2d 610

---

erty and represented just compensation to which they were legally entitled.

"Fifth — The Court erred in refusing to submit to the Jury the Special Issues which were duly and timely presented to the Court by the Defendants concerning moving cost suffered by the Defendants and also the cost of adapting the remainder of Defendants' property so that they could continue to operate a laundry and cleaning establishment thereon and also the loss of profits sustained by said Defendants on account of such partial taking, which under the preponderance, if not all of the evidence introduced, showed that due to such partial taking the Defendants had to relocate their business at substantial cost, expense and damages.

"Thirteenth—The Court erred in signing and entering the judgment for Plaintiffs herein, same being in violation of Amendment V. of the Constitution of the United States and of Article 1, Section 17 of the Constitution of the State of Texas."

(Tex. Civ. App.—Texarkana 1962); City of Carollton v. Rawlins, 291 S.W.2d 955 (Tex. Civ. App.—Eastland 1956, error ref.).

A consideration of appellant's points on the merits leads to the conclusion that the trial court did not err in refusing to allow recovery as separate items of damages the loss of profits sustained by appellant's business, or the moving costs incurred by appellant, as the result of the condemnation of a portion of appellant's property.

As a consequence of the taking on Tract 311 the building housing appellant's laundry and dry cleaning plant was severed, about 4,900 square feet of the building being within that portion of the tract taken, leaving about 8,000 square feet on the remainder. Equipment necessary to the operation of the entire plant was located within the part taken, including the steam boiler, water softener, air conditioning equipment, and a large flat press. Obviously a new wall would be required if the operations in the plant were to continue. At the time of this trial the building itself had not been severed. However, appellant had severed the water, steam, air conditioning ducts, and electrical lines prior to trial, and had removed all personal property from the area taken. This was necessary by reason of the fact that appellee had deposited the commissioners' award in the registry of the court.

There was testimony that the highest and best use of the property on June 10, 1969, the date of taking, was the use then being made of the property, that is, use of the property as a laundry, main plant and central offices, maintenance and carpenter shop, servicing a chain of 160 retail laundry and cleaning outlets. Both tracts of land, Tract 311 and 335, served as an over-all unit in

the operation of the business. The buildings on both tracts had been adapted to a special use where every square foot served a purpose. There was other testimony by expert witnesses produced by appellee that the highest and best use for the property was for laundry and dry cleaning purposes.

Appellee permitted appellant four months after the date of the taking to remove his business operations from that portion of the building taken. The business was disrupted during this period, and to some extent thereafter. Pilgrim's president testified that the remainder was not large enough for the dry cleaning assembly line, so that this operation was transferred to the Pasadena plant. There was not enough space for the large flat work ironer and a smaller one was installed in the remainder. This equipment would not take care of the work, and there was not enough storage space in which to store both the incoming material and the completed work. The company had a smaller plant on Stella Link, which it continued to operate, but it discontinued this type work at the subject property because it was not profitable in the small scale operation. At the time of the trial he had not been able to locate a suitable property for a new plant capable of handling the flat work operations.

By the end of the four month period the administrative offices, the carpenter shop, parts department, the labor office and the maintenance department had been transferred to another location. These activities were operated from the same location for economic reasons and there was not sufficient room in the remainder for all of them. The closing of the assembly lines in the Almeda plant made it necessary to discontinue most of the home pick-up and delivery routes.

The operation continued at the Almeda plant in the remainder at a reduced scale until it was abandoned for all purposes except as a retail pick-up and delivery station. Appellant had 160 different retail outlets. Prior to the date of taking the Almeda plant did flat work for 75% to 80% of the outlets. Appellant acquired land at 6723 Stella Link for its new main plant. It took about eighteen months to find a desirable location, purchase it, get some zoning restrictions removed, construct a building, install the necessary equipment, and begin operations. This plant was not designed for the flat work operation. Mr. Robertson, appellant's president, testified that by reason of the condemnation in his judgment it was no longer feasible to continue to operate the Almeda plant.

Appellant was permitted to introduce testimony as to the profits and losses sustained by the Almeda plant from January, 1969, to and including May, 1970, at which time the plant was shut down except for the retail operation. Substantial profits were shown for each month prior to the date of taking, and substantial losses were shown for each month after the date of taking. The trial court instructed the jury that the evidence concerning the profits and losses was admitted not as evidence tending to sustain such profits or losses as a separate item of damages, but that such evidence was admitted "as affecting the market value, if it does, of the remainder of the land and improvements on the subject property after the taking for the uses to which that remainder was adapted and was being put, and for that purpose only." Appellant made no objection to this instruction, and cannot now be heard to complain of this action of the court. Substantially the same instruction was included in the court's charge. If

objections were made to the court's charge, they were not included in the transcript.

Appellant's Requested Issue No. 1, refused by the court, reads:

> "From a preponderance of the evidence, what do you find was the amount of the loss of profits, if any, sustained by Pilgrim Equipment Company of Houston on account of the condemnation by the State of Texas and County of Harris of Pilgrim's property known as Tracts Numbers 311 and 335?"

While appellant has no point complaining of the failure of the trial court to submit this special issue, under his point charging the court with error in entering the judgment herein because of the failure to allow damages by reason of lost profits, he points to the action of the court in limiting the evidence as above set out and in refusing the special issue. These matters were sufficiently preserved in the motion for new trial. The claimed error in limiting the testimony was waived by appellant's failure to object to the instructions limiting the purpose for which the jury could consider the evidence relating to profits and losses at the various times such an instruction was given. King v. Roberts, 84 S.W.2d 718 (Tex. 1935); Texas-Mexican Ry. Co. v. Creekmore, 204 S.W. 682 (Tex. Civ. App.—San Antonio 1918, err. dism'd); Mayberry v. Campbell, 356 S.W.2d 827 (Tex. Civ. App.—Amarillo 1962, writ ref., n.r.e.).

The requested issue was not a proper inquiry. It does not restrict the jury to a finding of profits lost by reason of a temporary disruption of its business. It was appellant's contention that by reason of the taking the property was

no longer suitable for the use to which it had been devoted prior to the taking. Evidence of losses caused by permanent injury to the business was before the jury. Such a loss cannot be recovered as an item of damage separate from that resulting from the depreciation in value of the remainder. State v. Zaruba, 418 S.W.2d 499 (Tex. 1967); City of Dallas v. Priolo, 242 S.W.2d 176 (Tex. 1951); Huckabee v. States, 431 S.W.2d 927 (Tex. Civ. App.—Beaumont 1968, writ ref., n.r.e.); Reilly v. State of Texas, 382 S.W.2d 116 (Tex. Civ. App.—San Antonio 1964, ref., n.r.e).

The refusal of appellant's special issue designed to establish the expense of removing the personal property from the property taken to other property belonging to appellant was not error. These expenses might well result in a temporary loss of profit for the business. Unless compensation can be recovered for these items in that context (a question we do not decide here), it cannot be recovered in this action. These special items of damage were not specially plead, consequently it was not shown that the damage sought was within the jurisdiction of the County Court at Law in which the case was tried. These items may well constitute "damage" to appellant, but the cost of removing the personal property does not constitute "damage" to appellant's "property". Jurisdiction of this cause of action is statutory. Article 3265, V.A.C.S., prescribes "market value" as the test of adequate compensation in condemnation proceedings. City of San Antonio v. Congregation of the Sisters of Charity of the Incarnate Word, Inc., 404 S.W.2d 333 (Tex. Civ. App.—Eastland 1966, no writ). Neither Sec. 17, Article 1 of the Constitution, nor Article 3265, V.A.C.S., authorizes the County Court to entertain a cause of action for damages in a

condemnation case other than such damage to "property" as results from a taking for public use, subject to the exception contained in Sec. 7 of Art. 3265 specifically authorizing the recovery of moving expenses where the owner of land is "actually and physically displaced and permanently moves from . . . his place of business and limiting such recovery to the reasonable expense of moving the property, not to exceed $5,000.00 or the market value of such property." Appellant failed to request issues necessary for a recovery under Sec. 7. State v. Carpenter, 89 S.W.2d 979 (Tex. 1936); Kennedy v. City of Dallas, 201 S.W.2d 840 (Tex. Civ. App.—Dallas 1947, writ ref.); State v. Vaughan, 319 S.W.2d 349 (Tex. Civ. App. —Austin 1959, no writ).

Appellant's Point 7 does not present error. At several places in the record testimony was presented without objection that appellant had listed the remainder property for sale with the wall reconstructed on the south remainder. When a witness was asked "how much the real estate dealer was trying to get for the property," an objection was promptly sustained.

Appellant contends that the case must be reversed by reason of certain statements made by appellees' attorney during jury argument, contending that such argument was so prejudicial that its effect could not have been removed by an instruction from the trial judge. The attorney asked the jury "to be just as fair to the taxpayers of Harris County and the State of Texas as to the stockholders of Pilgrim Equipment Company." The arguments of counsel were not transcribed and appellees do not concede that this statement was made. An informal bill of exception is found in the statement of facts.

A review of the entire record leads us to the conclusion that no reversible error was shown. It is conceded that no objection was made at the time and that the trial judge was not requested to instruct the jury to disregard the statement. We do not think that the record demonstrates that such argument resulted in the rendition of an improper verdict or judgment. Kittrell v. State, 382 S.W.2d 273 (Tex. Civ. App.—Dallas 1964, ref., n.r.e.); Camp v. Commissioners Court of El Paso County, 279 S.W.2d 927 (Tex. Civ. App.—El Paso 1955, ref., n.r.e.).

Appellant complains of the action of the trial court in sustaining appellees' motion in limine to prohibit appellants' counsel from showing that the witness Hughes had earlier been employed by appellees to appraise appellant's property and that he was a witness for appellees at the Special Commissioners' hearing. Hughes was subpoenaed as a witness by appellant, but was not called to testify. There was no error in sustaining the motion in limine. State v. Biggers, 360 S.W.2d 516 (Tex. 1962).

The judgment is affirmed.

/s/ Tom F. Coleman

Associate Justice

Judgment rendered and opinion filed November 4, 1971.